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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

In the Matter of

Supreme Court  
No. R-

**PETITION TO AMEND RULE  
10.2, ARIZONA RULES OF  
CRIMINAL PROCEDURE**

**PETITION TO AMEND RULE 10.2,  
ARIZONA RULES OF CRIMINAL  
PROCEDURE**

The Office of the Maricopa County Public Defender, pursuant to Rule 28 of the Arizona Rules of the Supreme Court, petitions this Court to amend Rule 10.2 of the Arizona Rules of Criminal Procedure to allow a party in a capital case to file a change of judge when the case is administratively reassigned to a new trial judge. The proposed changes to the rule are attached.

Rule 10.2 as it pertains to capital cases was amended by the Supreme Court on July 1, 2001. The change requires the parties to exercise their rights to peremptory changes of judge within ten days after the filing of a notice to seek the

death penalty. Rule 15.1(i)(1) requires that the notice of intent to seek death be filed by the state within sixty days of arraignment unless that deadline is extended by mutual agreement of the parties. Thus the period within which a timely peremptory change of judge may be filed in a capital case is ten to seventy days from arraignment, absent a stipulation of the parties. This change has adversely affected the rights of parties in capital cases.

Rule 10.2, as currently construed by Division One of the Arizona Court of Appeals and the Arizona Supreme Court, affords the litigants in a capital case one peremptory change of judge which must be exercised within the period outlined above. There is no provision within Rule 10.2 that allows for change of judge upon request in a capital case upon administrative reassignment of the case to a new judge for trial, even if the parties have not previously used the peremptory change of judge within the ten-day period following the filing of the notice of intent to seek death.

Rule 8 of the Arizona Rules of Criminal Procedure establishes an eighteen-month speedy trial deadline for capital cases. Because of their extended length, many capital cases are administratively reassigned to new trial judges prior to the commencement of trial.

Requiring a capital case litigant to make a decision regarding the use of the Rule 10.2 change of judge within the first two months of a capital case that will

likely take eighteen months or more to resolve renders the right meaningless. The judge assigned due to the exercise of the right early in the case will, in all probability, be replaced by administrative reassignment. In Maricopa County, it is likely that the case will be administratively reassigned on the eve of trial because of the unavailability of the assigned judge. For the right afforded by Rule 10.2 to be meaningful, the parties must be able to exercise it when the judge assigned will in fact be the trial judge.

The opportunity to exercise a change of judge upon request after administrative reassignment currently exists for litigants in non-capital cases. There does not appear to be a rational reason to deny the parties in a capital case a right that is afforded to parties in non-capital cases. To make the rule consistent and meaningful, it should be changed to afford this important right to parties in all criminal cases.

The proposed amendment establishes two triggering events in a capital case that would entitle a party to file a change of judge upon request. The first event is the filing of a notice of intent to seek the death penalty. The ten-day period established by current Rule 10.2 following the filing of that pleading would be retained within the rule. If a party did not exercise its right to a change of judge by request at that time, the party would retain that right in the event of a second triggering event, the administrative reassignment of the case to a different judge.

Pursuant to Rule 28(G) of the Rules of the Supreme Court, Petitioners submit this request for expedited consideration by the Court, as the compelling circumstances presented in the petition render the annual processing cycle inadequate to timely address this urgent matter.

Wherefore, it is respectfully requested that this Court amend Rule 10.2 of the Arizona Rules of Criminal Procedure as set forth in Exhibit A.

RESPECTFULLY SUBMITTED this 9th day of December, 2009.

OFFICE OF THE MARICOPA  
COUNTY PUBLIC DEFENDER

By:                     /s/                      
JAMES HAAS  
Public Defender

By:                     /s/                      
DANIEL B. PATTERSON  
Deputy Public Defender

## **Exhibit A**

### **Rule 10.2. Change of judge upon request**

**a. Entitlement.** ~~Any party shall be entitled to request a change of judge as a matter of right no later than ten (10) days after the state files a notice of intention to seek the death penalty.~~ In any criminal case other than a death penalty case, each side is entitled as a matter of right to a change of judge. Each non-death penalty case, whether single or consolidated, shall be treated as having only two sides; except that, whenever two or more parties on a side have adverse or hostile interests, the presiding judge or that judge's designee may allow additional changes of judge as a matter of right. In a death penalty case, any party shall be entitled to request a change of judge. Notwithstanding the foregoing provision, the right to a change of judge shall be inapplicable to Rule 32 petitions for post-conviction relief or remands for resentencing.

**b. Procedure.** (No Change)

**c. Time for Filing – non-death penalty case.** A notice of change of judge in a non-death penalty case shall be filed within ten days after any of the following:

- (1) Arraignment, if the case is assigned to a judge and the parties are given actual notice of such assignment at or prior to the arraignment;
- (2) Filing of the mandate from an Appellate Court with the clerk of the Superior Court;
- (3) In all other cases, actual notice to the requesting party of the assignment of the case to a judge.

Notwithstanding the foregoing provision, if a new judge is assigned to a non-death penalty case fewer than ten (10) days before trial (inclusive of the date of assignment), a notice of change of judge shall be filed, with appropriate actual notice to the other party or parties, by 5:00 p.m. on the next business day following actual receipt of notice of the assignment, or by the start of trial, whichever occurs sooner.

**d. Time for Filing – death penalty case.** A notice of change of judge in a death penalty case shall be filed within ten days after any of the following:

- (1) Filing of a notice of intention to seek the death penalty;
- (2) Actual notice to the requesting party of the administrative reassignment of the case to a new trial judge, if the party requesting the change of judge has not previously done so under subsection (1) above.

**d e.** At the time of the filing of a notice of change of judge, the parties shall inform the court in writing if they have agreed upon a judge or judges who are available and are willing to have the action assigned to that judge. An agreement of all parties upon such judge may be honored and, if so, shall preclude further changes of judge as a matter of right unless the agreed-upon judge becomes unavailable. If no judge has been agreed upon, then the presiding judge shall immediately reassign the action.

If a judge to whom the action has been assigned by agreement later becomes unavailable because of a change of calendar assignment, death, illness, or other legal incapacity, the parties shall be restored to their rights under this rule as they existed immediately before the assignment of the action to such judge.